UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

DISTRICT COUNCIL OF NEW YORK CITY and VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, et al.,

Defendants.

90 Civ. 5722 (RMB)

DECISION AND ORDER

Having reviewed the record herein, including **(i)** the Consent Decree entered into between the Government and the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America ("District Council"), approved by United States District Court Judge Charles S. Haight Jr. on March 4, 1994, ("Consent Decree"); **(ii)** the Stipulation and Order, dated June 2, 2010, appointing Dennis M. Walsh, Esq. as the review officer ("Walsh" or "RO") and vesting in him the authority, among other matters, "to review the persons currently holding office or employment" and to "veto" any matter that may be "contrary to . . . any law or Court order entered in this case," "contrary to any fiduciary responsibility imposed by 29 U.S.C. § 501," or that "is inconsistent with the objectives of [the] Stipulation and Order"; **(iii)** the March 26, 2013 Notice of Possible Action by the Review Officer ("Notice of Possible Action") to Michael Bilello ("Bilello") notifying Bilello "that the Review Officer is considering issuing a veto of your service as Executive Secretary Treasurer of the [District Council]" because of suspected violations of Paragraph 5.b.iii (c), (d), and (e) of the Stipulation and Order (hereinafter "Five (5) Specifications") including: (1) "from on or about July 1, 2012, through March 12, 2013, [Bilello] failed to abide by Section 21 of the District Council Bylaws

and caused or attempted to cause employer compensation for members to be directed to the New York City District Council of Carpenters Welfare Fund"; (2) "on March 22, 2013, [Bilello] directed a business representative of the District Council attempting to properly enforce the collective bargaining agreement at the Javits Center to let a suspended member work at the Javits Center knowing the person had been suspended as a member"; (3) "from on or about September 2012, to the present, [Bilello] failed to continue the development of the business representative cross-training program recommended by the Review Officer and begun by the former District Council President"; (4) "from on or about January 11, 2012, to the present, [Bilello] failed to review minutes of the meetings of the Board of Trustees of the Benefit Funds with the District Council Executive Committee"; and (5) "on March 22, 2013, [Bilello] failed to cooperate with an investigation of the Review Officer by falsely stating, in sum and substance, that a certain business representative 'suggested to [Bilello] that [he] give [a suspended member] to the end of the week, like [they were] doing for others";[1] **(iv)** the April 29, 2013 Declaration of the Review Officer's Chief Investigator Jack Mitchell ("Mitchell Declaration") concluding, among other things, that (1) "[o]n or about June 28, 2012 Bilello signed a document titled 'Rate Increase Allocation' in which the amount of $2.59 an hour was directed to the Welfare Fund for each hour worked by members covered by the [Hoisting & Scaffolding Trade Association, Inc. ('HASTA')] CBA" in violation of Section 21 of the District Council bylaws which "gives the Delegate Body the sole power to decide all allocations to the various benefit funds"; (2) "Bilello directed Andrew Mucaria ["Mucaria"], a District Council business representative, to allow Cliff Blackwood ["Blackwood"] . . . to work at the Javits Center contrary to District Council policies

[1] The Notice of Possible Action included three additional specifications which Chief Investigator Jack Mitchell did not detail in his April 29, 2013 Declaration and which the Review Officer elected not to pursue in his April 29, 2013 Notice of Veto. (See Notice of Possible Action ¶¶ c, d, f; see also ¶¶ (iv), (v), infra.)

and the CBA between the Javits Center and District Council" even though Blackwood was suspended because he had not paid Union dues since March 2012; (3) Bilello neglected to develop a cross-training program for business representatives even after the RO emailed Bilello about the program on March 6, 2012 and Mitchell emailed Bilello regarding the program on October 4, 2012 and October 15, 2012; (4) "at no time did Bilello discuss the minutes of meetings of the Board of Trustees of the Benefits Funds with the Executive Committee" in contravention of Section 10(L) of the bylaws; and (5) during a March 22, 2013 interview with the RO, Bilello stated falesly that "Mucaria suggested that Mucaria could let Blackwood work like he let . . . others [work without having paid their dues] at the Javits"; **(v)** the April 29, 2013 Notice of Veto by Walsh ("Veto of Bilello") finding support for the Five Specifications and directing that Bilello's "service as Executive Secretary-Treasurer of the [District Council] is hereby vetoed," (Notice of Veto, dated April 29, 2013 ("Notice of Veto"), at 1–2); **(vi)** Bilello's appeal to this Court, dated May 24, 2013, of the RO's Veto contending that the Veto should be overturned as to each of the Five Specifications as "overreaching, capricious and unreasonable . . . unsupported by governing authority and indisputable facts," (Mem. of Law of Michael Bilello in Supp. of his Pet. To Vacate the Veto of the Review Officer, dated May 24, 2013 ("Bilello Petition"), at 1–2); **(vii)** the RO's response, dated June 14, 2013, to Bilello's Petition asserting that "[t]he veto was a proper exercise of the RO's authority under paragraph 5.b.iii of the Stipulation and Order [as to each of the Five Specifications]," (Memorandum of Law in Response to the Petition of Michael Bilello, dated June 14, 2013 ("RO Response"), at 1); **(viii)** Bilello's June 21, 2013 memorandum of law (Reply Memorandum of Law of Michael Bilello in Supp. of his Petition to Vacate the Veto of the Review Officer, dated June 21, 2013 ("Bilello Reply"), at 1); **(ix)** the United State's July 1, 2013 letter to the Court stating that "the government

is of the view that the Review Officer properly exercised his authority to veto Michael Bilello's tenure as the District Council's Executive Secretary-Treasurer," (Letter from Assistant United States Attorney Tara LaMorte to the Hon. Richard M. Berman, dated Jul. 1, 2013, at 1); **(x)** the hearing held by the Court on July 18, 2013, and applicable legal authorities **the Court hereby denies Bilello's appeal as follows**:[2]

1) The RO's Veto may be overturned by the Court only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Bilello Petition at 6 (quoting United State v. Dist. Council of New York City, 941 F. Supp. 349, 362 (S.D.N.Y. 1996)); see also RO Response at 12.) The RO's "findings of fact are entitled to affirmance on review if they are reasonable and supported by substantial evidence in the record as a whole and may be set aside only if they are unsupported by substantial evidence." (Bilello Petition at 6 (quoting United State v. Dist. Council of New York City, No. 90 Civ. 5722 (RMB), 2012 WL 5236577, at *5 (S.D.N.Y. Oct. 23, 2012)).)

2) The RO is empowered to veto matters enumerated in Paragraph 5.b.iii of the Stipulation and Order which provides:

> Upon reviewing any matter described in paragraphs 5.b.i and 5.b.ii, the Review Officer may determine that the matter reviewed (a) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; or (b) furthers or contributes to the association, directly or indirectly, of any member, employee, officer, trustee, or representative of the District Council or the Benefit Funds with any barred person; or (c) is contrary to or violates any law or Court order entered in this case; or (d) is contrary to any fiduciary responsibility imposed by 29 U.S.C. § 501 or [ERISA]; or (e) is inconsistent with the objectives of th[e] Stipulation and Order. Upon such a determination . . . the Review Officer may veto or require the District Council to rescind its action, proposed action, or lack of action."

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[2] The Court here affirms the RO's Veto on the basis of Specifications 1, 2, 4, and 5. The Court declines, without prejudice, to analyze Specification 3. See ¶ 5, infra.

Any issues raised by Bilello not specifically addressed herein were reviewed by the Court on the merits and rejected.

(Stip. & Order ¶ 5.b.iii.) The RO based his Veto of Bilello on subsections (c), (d), and (e). (Notice of Veto at 2.)

3) The RO has the power to remove ("veto") elected union officials under the circumstances presented here. See United States v. Dist. Council of New York City, No. 90 Civ. 5722 (RMB), 2012 WL 5236577, at *7 (S.D.N.Y. Oct. 23, 2012); see also United States v. Dist. Council of New York City, No. 90 Civ. 5722 (RMB), 2013 WL 2451737, at *2 (S.D.N.Y. June 5, 2013); United States v. Dist. Council of New York City, No. 90 Civ. 5722 (RMB), 2010 WL 5297747, at *8 (S.D.N.Y. Dec. 21, 2010).

4) The RO contends that Bilello's May 23, 2013 Affirmation in support of his Petition ("Bilello Affirmation") was developed nearly one month after the RO's April 29, 2013 Veto and was not part of the administrative record. (RO Response at 14.) Therefore, he argues, it should be excluded on this appeal. Id.; see also Maskara v. First Unum Life Ins. Co., No. 03 Civ. 498 (MHD), 2004 WL 1562722, at *1 (S.D.N.Y. July 13, 2004) ("The [administrative] record is properly viewed as comprising all materials in the case file up to the point at which the administrator made its final decision."). Bilello claims that his Affirmation "properly completes the [administrative] record." (Bilello Reply at 2.) He also acknowledges that "'completion of the record implies the addition of only those relevant documents that were actually available to, and considered by the agency [RO] at the time the decision was made.'" Id. at 3 n. 4 (quoting American Farm Bureau Fed'n v. U.S. E.P.A., No. 11 Civ. 0067 (SHR), 2011 WL 6826539, at *4 (M.D. Pa. Dec. 28, 2011)).

The Bilello Affirmation was not available to or considered by the RO in his Veto of Bilello and appears to "supplement" rather than "complete" the administrative record. See American Farm Bureau Fed'n, 2011 WL 6826539 at *4; Boatmen v. Gutierrez, 429 F. Supp. 2d

543, 548 (E.D.N.Y. 2006) ("The court must consider the reasonableness of an agency action based on the record in existence at the time of the decision; it will not engage in an evidentiary hearing or a de novo review.") (citing Florida Power & Light Co.v. Lorion, 470 U.S. 729, 743–44, 105 S. Ct. 1598 (1985)); see also Hr'g Tr., dated Jul. 18, 2013 ("7/18/13 Tr."), at 15:6–17 (WALSH: "[Bilello] was served with a notice of possible action on March 26, 2013. It spelled out . . . what his rights were in making the record, asking him to submit documents, any statements of fact, any memoranda of law. He did not do it. That was his choice."). Assuming, arguendo, that the Bilello Affirmation were part of the record, it would likely not impact this Court's rejection of Bilello's appeal, i.e. the Court would still find Bilello's claims unpersuasive for the reasons stated below. See pp. 6–17, infra.

5) The Court affirms the RO's Bilello Veto with respect to Specifications 1, 2, 4, and 5, finding that the RO's determinations with respect to these Specifications were "supported by substantial evidence in the [administrative] record as a whole" and were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Dist. Council of New York City, 2012 WL 5236577, at *5.[3]

Specification 1

6) The RO's April 29, 2013 Veto correctly concludes, with respect to Specification 1, that from on or about July 1, 2012, through March 12, 2013, Bilello failed to abide by Section 21 of the District Council Bylaws and caused or attempted to cause employer compensation for members totaling more than $900,000 to be directed to the New York City District Council of Carpenters Welfare Fund. (Notice of Veto at 1.) As Mitchell determined, "[o]n or about June

[3] Because these Specifications are fully supported by the RO, the Court need not review Specification 3. See, e.g., Robledo v. Number 9 Parfume Leasehold, No. 12 Civ. 3579 (ALC)(DF), 2013 WL 1718917, at *5 (S.D.N.Y. Apr. 9, 2013); United Stated v. Ajemian, 878 F. Supp. 2d 432, 439 n. 1 (S.D.N.Y. 2012); see also p. 4 n. 1, supra.

28, 2012 Bilello signed a document titled 'Rate Increase Allocation' in which the amount of $2.59 an hour was directed to the Welfare Fund for each hour worked by members covered by the [Hoisting & Scaffolding Trade Association, Inc. ('HASTA')] CBA" in violation of Section 21 of the District Council bylaws which gives the Delegate Body "the sole power" to decide all allocations to the various benefit funds. (Mitchell Declaration at 1.) Bilello contends that Specification 1 is "unreasonable" because, while "before the week of March 20, [2013] he had not taken note of § 21's terms," (Bilello Petition at 8), the Delegate Body approved his actions on March 27, 2013 nunc pro tunc, "curing any prejudice from this procedural oversight." (Bilello Petition at 10.) The RO responds (persuasively) that Bilello's action was more than a mere "procedural" oversight. (RO Response at 19; Bilello Petition at 1.) "Allowing Bylaws to be disregarded, especially based on past practices, [i.e. historical pervasive mismanagement in the Union], would undermine the reform efforts undertaken pursuant to the Consent Decree and the Stipulation and Order." Id.

The RO's veto, with respect to Specification 4, was supported by substantial evidence and was not arbitrary or capricious. See Dist. Council of New York City, 2013 WL 2451737, at *5. Section 21 of the District Council Bylaws clearly states that "[a]ll allocations from negotiated wage amounts to annuity, health and welfare, pension, funds sponsored by the International, apprenticeship, labor-management cooperation committees, vacation savings, and holiday plans, shall be determined by the Council Delegate Body." District Council Bylaws § 21. As noted, Bilello acknowledges that he violated Section 21 when on June 28, 2012 he "approved an allocation of the HASTA rate increase that directed substantially all of the increase to the Welfare Fund" without obtaining prior approval from the District Council Delegate Body. (Bilello Petition at 8; see also 7/18/13 Hr'g Tr. at 21:10–13 (PETRILLO: "[Bilello] knew a

bunch of the bylaw provisions but not all of them." THE COURT: "He didn't know [Section 21]?" PETRILLO: "Correct.").) Delegate Body approval was not obtained until March 27, 2013, nine months after the June 28, 2012 allocation to the Welfare Fund. (Bilello Petition at 8.)

Bilello's contention that his violation of Specification 1 was "cured" nine months after the fact by the Delegate Body is unpersuasive—and is not supported by legal authority. (See Bilello Petition at 8.) Nor is Bilello's contention consistent with the nunc pro tunc doctrine which is typically reserved for "exceptional" cases. See Negron v. United States, 394 Fed. App'x 788, 791 (2d Cir. 2010) (nunc pro tunc "is a far-reaching equitable remedy applied [only] in certain exceptional cases, typically aimed at rectifying . . . injustice to the parties"); Zhang v. Holder, 617 F.3d 650, 665 (2d Cir. 2010) ("[T]he doctrine of nunc pro tunc 'is a far-reaching equitable remedy applied in certain exceptional cases,' typically aimed at 'rectify[ing] any injustice [to the parties] suffered by them on account of judicial [or agency] delay.'") (quoting Iouri v. Ashcroft, 464 F.3d 172, 182 (2d Cir. 2006)).[4]

Bilello, as the highest official of the District Council, was required to follow the Bylaws. His failure to do so was a breach of his fiduciary duty. See Section 501(a) of the Labor–Management Reporting and Disclosure Act, 29 U.S.C. § 501(a) (providing that it is the duty of an officer of a labor organization "to manage, invest, and expend the [organization's money] in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder . . . ."); Guzman v. Bevona, 90 F.3d 641, 648 (2d Cir.1996) ("The officers' acts violated the Union's Constitutions and thus were unauthorized expenditures of the Union's money and property in breach of the officers' fiduciary duties."); District Council of New York

[4] As the RO points out, "[a]lmost $1 million in allocations" were improperly directed to the Welfare Fund and that if the Delegate Body vote had been to reject Mr. Bilello's action, "there was no obligation on the Benefit Funds' part to return the money." (RO Response at 19.)

City, 2013 WL 2451737, at *6. "It was Mr. Bilello's responsibility to run the Union knowing and adhering to the Bylaws and any other relevant rules," (RO Response at 20), not to approve a $900,000 benefits allocation without Delegate Body approval and reading the Bylaws. See Stipulation and Order §5(b)(iii)(d); Dist. Council of New York City, 2013 WL 2451737, at *4 (retroactive approval by vote of authorizing body "does not rebut the RO's argument that prior approval was not sought or obtained").[5]

Specification 2

7) The RO's April 29, 2013 Veto of Bilello correctly concludes, with respect to Specification 2, that "Bilello directed a business representative [Andrew Mucaria] of the District Council . . . to let a suspended member work at the Javits Center knowing that the person had been suspended," in violation of the Javits Center collective bargaining agreement ("Javits Agreement"). (Notice of Veto at 1.)

Bilello argues that Specification 2 "is premised on a legal error" in that the "maintenance of membership" clause in the Javits Agreement, requiring union membership as a condition of employment, allegedly violated the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), and the Taylor Law, 14 New York State Civil Service Law § 202. (Bilello Petition at 16, 24). The RO (persuasively) responds that Bilello also failed to exhaust his administrative remedies with respect to this Specification and that, even if he had preserved this claim for review, "[w]hat Mr.

[5] Bilello also asserts unpersuasively that "[t]he relevant gatekeepers, the [Inspector General ('IG')], the [Chief Compliance Officer ('CCO')], and the Executive Committee, including Mr. Bilello, and the RO and Counsel all failed to observe §21's requirements." (Bilello Petition at 10.) Even if this argument had any merit (which is doubtful), Bilello failed to assert this claim to the RO following the March 26, 2013 Notice of Possible Action by the Review Officer and during the ensuing investigation and submission process. RO Response at 20. That is, Bilello failed to exhaust his administrative remedies as to this claim. See Fernandez v. Apfel, No. 97 Civ. 6936 (AJP), 1998 WL 603151, at *16 (S.D.N.Y. Sep. 11, 1998) ("It would be unfair to the [Defendant] for the Court now to review an issue which [Plaintiff] could have raised [before the administrator], but which she did not, either because of oversight or for tactical reasons.").

Bilello did was a classic example of what is not permitted . . . . [P]ower within the Union cannot be utilized to bestow the favor of permitting someone to work when he is not entitled to." (RO Response at 14; see also Fernandez v. Apfel, No. 97 Civ. 6936 (AJP), 1998 WL 603151, at *16 (S.D.N.Y. Sep. 11, 1998) ("It would be unfair to the [Defendant] for the Court now to review an issue which [Plaintiff] could have raised [before the administrator], but which she did not, either because of oversight or for tactical reasons."); 7/18/13 Hr'g Tr. at 14:15–18 (WALSH: "[Bilello's directive to allow the suspended member work] was antithetical to the goal of the stipulation and order, which is to eradicate—not to tolerate, not to coddle, not to rationalize—corruption and racketeering from the affairs of the union.").)

Assuming, arguendo, that Bilello's claim with respect to Specification 2 were properly raised, the Court would likely nevertheless find that the RO's Veto of Bilello was not arbitrary or capricious and was supported by substantial evidence. See Dist. Council of New York City, 2013 WL 2451737, at *4. It appears from the record that, on Friday March 22, 2013, carpenter Cliff Blackwood came to the Javits Center seeking work but was unable to sign in because he did not possess a valid union card.[6] (Undated Mem. of Interview of Cliff Blackwood on 3/26/13 from RO Deputy Chief Investigator William J. O'Flaherty ("O'Flaherty") to Walsh ("O'Flaherty Blackwood Mem.") at 1). Blackwood met with Business Representative Andrew Mucaria who told Blackwood that he was "ineligible to work" because "he was suspended for failure to pay his union dues." Id. Blackwood called the District Council and "begged Bilello for assistance to help him keep his job at the Javits Center." Id. Mucaria says that, immediately thereafter,

[6] Blackwood had not paid Union dues in a year, i.e. since March 2012. (Decl. of Andrew Mucaria, dated March 26, 2013, at 1.)

"Bilello directed me to allow Blackwood to work." (Decl. of Andrew Mucaria, dated March 26, 2013 ("Mucaria Decl."), at 1.)[7]

The "maintenance of membership" clause in the Javits Agreement has been analyzed previously in these proceedings and was not deemed to be an unfair labor practice. See United State v. Dist. Council of New York City, 941 F. Supp. 349 (S.D.N.Y. 1996).

> As a general matter, federal labor law prohibits a union from causing an employer to discriminate against an employee in order to induce the employee to join the union or behave like a 'good' union member . . . . Moreover, an individual who has been denied or terminated from membership cannot be the subject of union-induced discrimination by the employer, unless his poor standing in the union derives from a failure to pay dues . . . . These precepts are codified in section 8(b)(2) of the NLRA.

Id. at 378–79 (emphasis added). Judge Haight noted that, "as a legal matter," union members whose dues were in arrears could be precluded from working under the Javits Agreement. Id. at 381.

Bilello attempts to distinguish previous rulings by stating that "a union member must be offered, among other things, clear notice of the amount of dues owed and given a reasonable opportunity to make payment." (Bilello Reply at 8.) But, Bilello fails to cite to any persuasive case law or decisions of the Public Employment Relations Board ("PERB") in support of his assertion that a maintenance of membership clause "is not enforceable." (See Bilello Petition at 25.) New York courts appear not to have held them to be unenforceable. See Stork Restaurant, Inc. v. Fernandez, 16 Misc. 2d 265, 268, 184 N.Y.S. 2d 810 (N.Y. Sup. Ct. 1959); Dassinger v.

[7] Also, on March 22, 2013, three other (suspended) members were not permitted to work because they were more than three months delinquent in their union dues. (Email from Mucaria to Paul Capurso, Joseph DiNapoli, and Matt Walker, dated March 22, 2013, at 1.)

Steinberg, 6 Misc. 2d 89, 93, 160 N.Y.S. 2d 1000, (N.Y. Sup. Ct. 1957).[8] Moreover, there is no evidence in the record, including the March 26, 2013 interview with Blackwood, indicating that he was not afforded an opportunity to make (dues) payment. (See O'Flaherty Blackwood Mem.)

Bilello asserts unpersuasively that the Javits Agreement indicates "the parties' intention to afford a 30-day grace period to non-union members during which they may become members" and that Blackwood "was seeking a much shorter grace period." (Bilello Petition at 27.) But the record reflects that Blackwood was already a union member, albeit one who had been suspended for failure to pay his dues. (See Mucaria Decl. at 1.) The Javits Agreement makes crystal clear that employees "must maintain their membership in good standing in the Union as a condition of continued employment." (Javits Agreement, Article IV § 1; 7/18/13 Hr'g Tr. at 13:13–17 (WALSH: "[Bilello improperly] told a business agent, attempting to do his job, attempting to enforce the policy of the District Council, which had been in place since at least 2001 when the operative collective bargaining agreement was first in place, that [Blackwood] was OK to work.").)

[8] Bilello's assertion in his Petition that his "judgment" to allow Blackwood to work at the Javits Center was based on "his recent experience in a case settled by the union" is inconsistent with the record. (Bilello Petition at 25.) "I . . . recalled and was considering a settlement paid recently by the District Council to a Local 2287 member based on his claim that he had been blocked improperly for unpaid dues." (Bilello Affirmation, dated April 26, 2003 ("4/26/13 Bilello Affirmation"), at1.) Bilello does not provide the citation to the "recent . . . case" or explain why he thought it was relevant to the situation involving Blackwood. Id.; see also One Commc'ns Corp. v. JP Morgan SBIC LLC, 381 Fed. App'x 75, 78 (2d Cir. 2010) ("Allegations that are conclusory or unsupported by factual assertions are insufficient.") (citation omitted).) Nor does Bilello explain why the recently settled case did not prompt him to ensure that the three other suspended members who were turned away by Mucaria on March 22, 2013 at the Javits Center would be permitted to work. (See Email from Mucaria to Paul Capurso, Joseph DiNapoli, and Matt Walker, dated March 22, 2013, at 1.)

Specification 4

8) The RO's April 29, 2013 Veto of Bilello correctly concludes, with respect to Specification 4, that from on or about January 11, 2012 to the present, Bilello failed to review minutes of the meetings of the Board of Trustees of the Benefit Funds with the District Council Executive Committee, in contravention of Section 10(L) of the Bylaws of the District Council. (Notice of Veto at 1.) Bilello contends that this occurred as a result of "inadvertent error" and the Veto is "dubious" and "lacks any degree of reasonable proportion" because no notice was given "to remedy the questioned practice." (Bilello Petition at 13.) The RO responds that "[i]t was important that Mr. Bilello follow Section 10(L) and inform the Executive Committee of matters addressed at the Benefit Funds Board of Trustee's meetings as a matter of democratic governance, a cornerstone of the Consent Decree." (RO Response at 21.)

The RO's veto, with respect to Specification 4, was supported by substantial evidence and was not arbitrary or capricious. See Dist. Council of New York City, 2013 WL 2451737, at *5. Bilello acknowledges that he violated Section 10(L) of the District Council Bylaws. "Mr. Bilello acknowledges that prior to issuance of the Notice [of Veto], he did not follow a formal practice of reviewing with the Executive Committee all items covered in the minutes of the Trustees' meetings. He would however review items that he viewed as salient. . . ." (Bilello Petition at 12; Hr'g Tr. at 8:15–18 (PETRILLO: "[Bilello] didn't realize that under the bylaws he was supposed to in more detail review the minutes."); Mitchell Declaration at 4 ("[A]t no time did Bilello discuss the minutes of meetings of the Board of Trustees of the Benefit Funds with the Executive Committee.").)

Bilello complains that other parties failed to observe his noncompliance with the Bylaws and this fact somehow absolves him of his neglect of duty. "In late 2012, at the RO's request,

the [Inspector General] and its [Chief Compliance Officer] conducted an audit of the District Council's compliance with the By-laws" and they "missed this issue entirely in the 2012 Review." (Bilello Petition at 8, 13.) He also notes that "none of the RO, Mr. Tyznar, Mr. Wallace, or the Vice President of the DC raised any question regarding his practice of focusing on prominent Trustees' meetings issues" rather than more thoroughly reviewing the minutes. (Bilello Petition at 12.)

Bilello failed to advance this "argument" to the RO during the veto determination process and, therefore, failed to exhaust his administrative remedies as to this claim. (See RO Response at 21; Fernandez, 1998 WL 603151, at *16; see also pp. 10, 12, supra.) And, even assuming, arguendo, that Bilello's contentions were properly before the Court, they would likely be unpersuasive. "As EST and a Trustee of the Funds, it was incumbent upon Mr. Bilello to review the minutes with the Executive Committee in accordance with Section 10(L) of the Bylaws." (RO Response at 20.) There is no support for Bilello's assertion that it was the responsibility of others to "catch" his malfeasance. (See District Council Bylaws § 21.)

Specification 5[9]

9) The RO's April 29, 2013 Veto of Bilello correctly concludes, with respect to Specification 5, that "on [Friday] March 22, 2013, Bilello failed to cooperate with an investigation of the Review Officer by falsely stating (lying) that [Mucaria] 'suggested to me that I give [Blackwood] to the end of the week [to pay his dues], like we are doing for others.'" (Notice of Veto at 2.) Bilello argues that "[t]he materials submitted by the RO do not even establish a contradiction between Mr. Bilello and Mr. Mucaria, let alone anything that reasonably may be interpreted as a false statement by Mr. Bilello." The RO counters that "Mr. Bilello

[9] Specification 5 is closely related to Specification 2.

ma[de] a false statement to the RO in essentially stating that Mucaria [as opposed to Bilello] had raised putting the suspended member to work and he (Bilello) agreed" and that "neither the EST [Bilello] nor any other Union official or member can lie to the RO and be viewed as acting consistent with the objectives of the Stipulation and Order." (RO Response at16, 17.)

Bilello stated that "Mucaria asked whether I wanted to let Blackwood 'go to the end of the week like the others.' . . . I agreed." (4/26/13 Bilello Affirmation ¶ 5.) And, in an interview with Chief Deputy Investigator O'Flaherty, "Bilello said Mucaria suggested giving Blackwood until the end of next week to pay his dues . . . and that Bilello agreed to allow Blackwood to work." (Undated Mem. of March 22, 2013 Interview of Michael Bilello from O'Flaherty to Walsh ("O'Flaherty Bilello Petition") at 1.) By contrast, Mucaria stated that "I never told or suggested to Bilello that Blackwood be allowed to work without paying his dues in full" and "Bilello directed me to allow Blackwood to work." (Mucaria Decl. ¶ 3.)

Mucaria's version of events is supported by the testimony of District Manager of Business Representatives Paul Capurso ("Capurso"), Business Representative Robert Villalta ("Vilallta"), and Blackwood. (See O'Flaherty Blackwood Mem. at 1–2; Declaration of Capurso, dated April 18, 2013 ("Capurso Decl."), ¶ 3; Declaration of Villalta, dated April 25, 2013 ("Vilallta Decl."), ¶ 2.) Capurso, Mucaria's supervisor, stated that "[a]t no time did Mucaria describe suggesting to Bilello that Blackwood could work while suspended." (Capurso Decl. ¶ 3.) Villalta, another business representative at the Javits Center, stated that "I was informed by Mucaria that he had been told by EST Bilello to allow a member to work at the Javits Center who was currently suspended." (Vilallta Decl. ¶ 2.) And, Blackwood (even) appears to have told O'Flaherty that Mucaria "told him that he was ineligible to work," that he then "begged Bilello for assistance," and that, immediately after speaking with Bilello, Mucaria "told

[Blackwood] to go over to the desk and sign in to work." (O'Flaherty Blackwood Mem. at 1–2.)[10]

The RO's Veto of Bilello, with respect to Specification 5, was supported by substantial evidence and was not arbitrary or capricious. See Dist. Council of New York City, 2013 WL 2451737, at *5. Bilello's statements made during the RO's investigation of Bilello's conduct amounted to a violation of Section 7 of the Stipulation and Order. (See Stipulation and Order § 7; 7/18/13 Hr'g Tr. at 15:1–5 (WALSH: "I believe that [Bilello's April 26, 2013] affidavit [shifting the blame to Mucaria] is false. I believe the record shows that that affidavit is false. I believe the statement that he made [that it was Mucaria's suggestion that Blackwood be allowed to work at the Javits Center on March 23, 2013] to me on the afternoon of March 22nd is false. He did not cooperate with my investigation by making that statement.").) Section 7 of the Stipulation and Order states that "[t]he District Council and benefit Funds, including all officers . . . must cooperate with the Review Officer in any matter undertaken by the Review Officer pursuant to the Stipulation and Order. Failure to cooperate with the Review Officer is expressly made a violation of this Stipulation and Order." (Stipulation and Order § 7.)

10) Finally, at the July 18, 2013 hearing, the following colloquy occurred between the Court and Bilello's counsel:

> THE COURT: "So what is your and Mr. Bilello's take on all of this? . . . The RO, is he just being irrational, is he being arbitrary, and why do you think that is all happening?"

[10] The record reflects that Bilello's statements did "have some significance" because they were an attempt to obfuscate Bilello's responsibility for directing that a suspended member be allowed to work. (See RO Response at 17.) "The core purpose of the Stipulation and Order of 2010 is to place the corruption-plagued union under effective review by a court-appointed officer. If that court-appointed officer can't count on truthful statements in all its investigations, [the United States Attorney's Office] take[s] that extremely seriously." 7/18/13 Hr'g Tr. at 18:19–24.

> PETRILLO: "I think what comes out of the specifications . . . is they are clearly an agenda to remove Mr. Bilello. . . . I'm thinking it is a personality conflict or maybe something that just got blown out of proportion as a result of human frailty."

(7/18/13 Hr'g Tr. at 11:6–14, 12:1–10.)

The Court believes that the above analysis belies counsel's interpretation. (See pp. 6–16, supra.) And, in light of the history of District Council mismanagement, corruption, indictments, and convictions, it is the Court's view that the RO's diligence and watchfulness are necessary to ensure adherence to the Stipulation and Order and the Bylaws. (See, e.g., Stipulation and Order at 1–2 ("[O]n April 18, 2007, the District Council and its President . . . were adjudicated in contempt of court for violating the Consent Decree . . . on September 17, 2007, [EST] Michael Forde was held in contempt of court for violating the Consent Decree . . . in recent years certain persons have been convicted of criminal offenses relating to the District Council and the Benefit Funds . . . on August 5, 2009, an indictment by a grand jury in this district was unsealed charging various acts of racketeering against certain employees and representatives of the District Council"); see also United States v. Forde, No. 11 Civ. 8768(VM), 2012 WL 5205966 (S.D.N.Y. Oct. 12, 2012) (where, notwithstanding the Stipulation and Order and the Consent Decree, former District Council EST Michael Forde "pled guilty [on July 28, 2010] to violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c)(d)" and was sentenced to 132 months of imprisonment followed by three years of supervised release; a $50,000 fine; $100,000 in forfeiture; and restitution, which was subsequently determined to be $5,710,582.76); Dist Council of New York City v. Forde, No. 11 Civ 5474(LAP), 13 WL 1454954, at *2 (S.D.N.Y. March 26, 2013) (detailing "bribery of union officials in exchange for assistance in evading requirements to pay contractual wage rates" by contractor James Murray and noting that Murray was "indicted and plead guilty in 2009" to embezzlement, bribery, and

other charges); United State v. Dist. Council of New York City, No. 90 Civ. 5722(RMB) (reflecting the fact that Joseph Olivieri was "convicted of perjury [on October 27, 2010] (following a trial) for lying in a deposition (in this case)" about his relationship with James Murray and his affiliation with the Genovese crime family).)

In short, there is a continuing need for zero tolerance of official misfeasance and malfeasance at the District Council.

Conclusion & Order

For the foregoing reasons, Bilello's Appeal [#1268] is denied.

Dated: New York, New York
August 5, 2013

RMB

RICHARD M. BERMAN, U.S.D.J.